

RESOLVING FOREIGN-INTEREST BUSINESS DISPUTES IN THE PEOPLE'S REPUBLIC OF CHINA

John R. Singleton, Q.C.

The People's Republic of China (PRC) is likely to continue as the largest growing economy in the world for decades. To repeat an often heard phrase: "China is open for business"—and business knows it. It's not only the fast food industry that has arrived in the PRC—builders, designers, the telecommunications industry, raw materials suppliers and an endless line of others are already doing business there. And with the increased economic activity comes the inevitable: an increase in the number of business disputes. In turn this has created a quandary for some companies—how does one resolve a business dispute in the PRC?

The examples are typical. How does a foreign-controlled interest doing business in the PRC get paid by a PRC business that defaults on its payment or contractual obligations? How does a foreign interest secure compensation for damages that it has suffered when a PRC corporation or individual fails to deliver products or services it had agreed to deliver? In Canada, the United States or any other Western nation, there are well-established judicial systems, civil or common law systems, that offer the requisite remedies in any given situation. In addition many countries have established alternate dispute-resolution mechanisms and organizations available to deliver justice by structured mediations or arbitrations. These provide businesses with a feeling of assurance that, when one becomes involved in a business dispute, there is an established process to address wrongs and to secure due compensation. That is not the case in the PRC, at least not yet.

A little background is in order here. From the time of Confucius to the arrival of the Communist government in the PRC 2600 years later, the way to resolve disputes in China, business or otherwise, was in a harmonious fashion without the angst and adversity which the litigation system in the Western world carries. Parties to a dispute were "encouraged" to resolve their differences cooperatively (albeit, they may have felt the strong fist of the Emperor or local government agent behind them) with what today might be referred to as "amicable negotiation"; they did not resort to any structured legal system or dispute resolution mechanism designed to allow a full investigation into the subject matter of a dispute. Although the absence of due process was obvious, as was the absence of any principles of fairness and justice, the system had its merits; it preserved the prevailing Emperor's or government's desire to not alter the existing social fabric or

at least not threaten it. But it was a system of dispute resolution which would not survive any modern Western nation's constitution or bill of rights.

This same approach to dispute resolution continued from 1950 to 1980, with the government exercising its desired total control over society by itself being the decision maker in most disputes, business or otherwise. Then, as the PRC's economic system began to change in the early 1980s, the court system was reintroduced. This system "functioned" until 1995 but not in any transparent fashion. The government and military authorities were still behind the resolution of most disputes and forced conciliation remained the preferred way of settling them. But further changes were on the way.

As the PRC continued to industrialize and more and more investment found its way from the West into the nation's booming economy, the PRC government realized the need for a judicial system that recognized the rights of individuals and businesses if this industrialization was to continue effectively. The most significant development was not in the court system itself although the reintroduced court system continues to function to this day with a very large case load. There are 220,000 judges in the PRC who oversee 3,234 courts—in 2006, they decided 8.1 million cases. There are fewer lawyers—just 150,000 to service 1.3 billion citizens.

Although this system has proven to be effective for foreigners involved in patent litigation in the PRC, it has a less than stellar reputation among foreign investors for cases involving copyright and trademark disputes and even less of a reputation for resolving business disputes. Indeed, those familiar with and operating in the PRC's court system concede that a foreign interest currently should not be optimistic about achieving a satisfactory result. According to these sources, the PRC's judicial system is still anything but transparent. It has an international reputation of being run by government officials who impose decisions on those who would, in any Western country, be an independent judiciary. In other words, the PRC's judicial system has not substantially changed since 1995; the judicial structure appears to be well-developed and have all the trappings you find in similar systems in the Western world but, in reality, it is not impartial or independent of the government.

How then do foreign interests resolve business disputes in China if they cannot rely on the PRC's courts for equitable decisions? The answer seems to lie in the use of well-developed and sophisticated arbitration or mediation services in various parts of the PRC. There are various options available, including the Beijing Arbitration Commission (established in 1995), the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre (established in 1991) and the Chinese International Economic and Trade Arbitration Commission (CIETAC), founded in 1956 and recently reinvigorated with a new set of rules in 2005. The first three of these centres

are commendable, well structured and active. Each has an excellent set of arbitration rules but CIETAC is now the main centre for resolution of foreign related business disputes in PRC.